



EEOC Steps Up Scrutiny of Workplace Wellness Programs: What's the Skinny?

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As is commonly known, over the last several decades an epidemic of "lifestyle diseases" has developed in the United States. Certain unhealthy lifestyle activities—such as inactivity, poor nutrition, tobacco use, and frequent alcohol consumption—have caused a sharp increase in the prevalence of chronic disease, such as diabetes, heart disease, and chronic pulmonary conditions. Out of a direct concern for the impact of chronic disease on employee health and well-being—as well the cost of health care coverage and employee productivity—employers have increasingly begun implementing health promotion and disease prevention policies, commonly referred to as workplace "wellness programs." Indeed, the recently enacted Affordable Care Act creates new incentives to promote employer wellness programs (a subject related to but beyond the scope of this note). While specific wellness program procedures will vary from workplace to workplace, their primary purpose is the generally the same: to establish an organization-wide policy designed to support healthy behavior and improve health outcomes while at work.

Before designing and establishing wellness programs, however, employers should take heed of recent litigation initiated by the Equal Employment Opportunity Commission ("EEOC") directly challenging the legality of such programs under federal anti-discrimination laws. The most recent of these lawsuits, which was filed against Honeywell International, Inc. charges that the employer's wellness program violates both the Americans with Disabilities Act ("ADA")—by requiring employees to disclose protected medical information and to undergo medical examinations—and the Genetic Information Nondiscrimination Act ("GINA")—by providing inducements to employees to obtain their family medical history. The EEOC's recent and aggressive stance against wellness programs, in combination with its minimal published guidance on the issue, indicates that employers should proceed cautiously and thoughtfully before implementing any workplace wellness program.

The EEOC's Minimal Guidance on Wellness Programs. EEOC regulations and Interpretive and Enforcement Guidance limit an employer's ability to require employees to submit to a physical examination or respond to health-related inquiries except where they are either job related or part of a "voluntary" wellness program. In previously published guidance on the issue, the EEOC specifically stated that a wellness program is voluntary where the employer neither requires employee participation nor penalizes employees who elect not to participate. As recently as 2013, the EEOC Office of Legal Counsel reiterated this position in a discussion letter, while specifically noting that the EEOC "has not taken a position on whether and to what extent a reward amounts to a requirement to participate, or whether withholding of the award from non-participants constitutes a penalty, thus rendering the program involuntary." See Jan. 18, 2013 Discussion Letter re: [ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations](#).

EEOC v. Honeywell. Under Honeywell's wellness program, employees (and their families) have the option of participating to allow them to learn about their health status and to receive encouragement for improving specific health goals. Employees who participate in the program undergo biometric testing and are eligible to participate in the company's Health Savings Account ("HSA"), to which the company makes annual contributions subject to certain income-level thresholds. In contrast, employees who decline are not eligible to participate in the company-sponsored HSA and also must pay a \$500 surcharge that applies towards their annual health insurance contribution. Additional nicotine surcharges may be imposed on employees and their spouses when they are unable to rebut the presumption caused by their refusal to participate in the program that they are nicotine users.

After three Honeywell employees filed complaints with the EEOC alleging that the program violated the ADA and GINA, the EEOC filed a lawsuit against Honeywell on its own behalf alleging the same. According to the EEOC, Honeywell's wellness program is not "voluntary" because of the "large" and "substantial" penalties imposed on those individuals who choose not to participate. As a result, the disability-related inquiries and medical examinations required under the program—which could reveal lifestyle and health issues of employees and their families—allegedly violate the ADA. Additionally, the EEOC alleges that the wellness program provides inducements to employees in order to obtain employee family medical history, in violation of GINA. As characterized by the EEOC, employees not participating in Honeywell's program would pay up to \$2,500 in "direct surcharges," as well as lose "up to \$1,500 in contributions" to the employee's HSA. Such surcharges, the EEOC claims, constitute penalties designed to induce employees to undergo medical examinations that are not job-related or consistent with business necessity.

Although the federal district court in which the lawsuit was filed denied the EEOC's request for a temporary restraining order and preliminary injunction (which would have prevented Honeywell from imposing any penalty or providing any inducement under the program—as described above—while the lawsuit proceeded), the court did not address the EEOC's likelihood of success in the litigation. Thus, while the lawsuit moves forward, confusion remains as to whether—and under what circumstances—wellness programs comply with the ADA and GINA.

Employer Take Away. Until the EEOC provides further guidance on the issue, employers wishing to implement wellness programs should proceed with caution. At bottom line: to survive EEOC scrutiny, wellness programs must be truly "voluntary." The EEOC's position in the recent Honeywell litigation demonstrates that the EEOC is likely to consider a wellness program to be "involuntary" where expensive penalties may be imposed against individuals who "elect" not to participate. Similarly, significant rewards given to employees for their participation in the program may equally render a wellness program involuntary in the EEOC's eyes. Even where wellness programs are deemed voluntary, to comply with applicable federal law, employers must take steps to ensure that no employee is retaliated against as a result of his/her refusal to participate or due to any opposition to a wellness program. Furthermore, any medical information obtained through a wellness program must be kept confidential and should never be used as a basis for making any employment decisions.

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